Supreme Court, U.S.
FILED

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01-80 MAR 06 2001

No. _____

In The
Supreme Court of the United States

CAUSEY BRYANT, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent,

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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40 pp

QUESTIONS PRESENTED

1. Whether the newly discovered evidence shows that Counsel had substantially participation in the investigation that led to the petitioner's indictment, arrest and ultimate conviction in violation of petitioner's due process right to a fair trial.

2. Whether the petitioner was denied ineffective assistance of Counsel were the government's lead prosecutor/investigator was petitioner's trial Counsel and AUSA out of the Jacksonville office, who was cross-designated as a Special Assistant State Attorney, in that capacity were able to appear before state authorities for wire tap orders against petitioner.

3. Whether the petitioner due process rights was violated when Counsel for the Petitioner was cross-designated as a Special Assistant State Attorney in the investigation of the petitioner.

4. Whether the new prevailing case law handed down from the Supreme Court in Apprendi has now established as a constitutional rule that, in which the Court in Jones suggested by way of footnote, as a result, in a Federal Statute where the quantity or type of drug constitutes a factor which might increase the maximum statutory penalty for an offense, then the quantity or type of drug constitutes an element of such an offense.

PARTIES DISCLOSURE STATEMENT

All parties do not appear in the caption of this case and on the cover page. A list of all parties to the proceeding in the Court, whose judgment is the proceeding in the Court, and whose judgment is the subject of this petition is a follows:

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

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PRELIMINARY STATEMENT

I express a belief, based upon a reasoned and studied professional judgment, that the panel's decision is contrary to the following decisions of the United States Courts of Appeals for the Eleventh Circuit and the Supreme Court of the United States, and consideration by the full Court is necessary to secure and maintain uniformity of decision in this Court.

I further express a belief, based upon a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance. Whether a defendant is denied a fair trial where the trial lawyer interfered with the defendant's right to a fair trial, at one or more of the critical stages of the petitioner's criminal proceedings.

The Supreme Court, as well as other courts, have held that convicted defendants have a due process right to be sentenced on the basis of accurate information. The Petitioner's due process of rights were violated when his ineffective attorney investigated Petitioner for the purpose of prosecution in federal court. And, then represented the Petitioner at trial on the same investigation that Counsel spearheaded in the Petitioner's criminal defense in federal court, and the United States Attorney, who prosecuted the case at trial co-signed Counsel activity.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit Court was decided on November 13, 2000. The Petitioner's motion for a Certificate of Appealability was denied for the failure to make a substantial showing of the denial of a constitutional right, 28 U.S.C. § 2254 (c)(2). Attached hereto as Appendix [1].

On January 17, 2001, the Petitioner's petition for re-hearing "en banc" motion for a Certificate of Appealability was denied. Attached hereto as Appendix [2].

The order of the United States District Court for the middle district of Florida, Jacksonville is officially reported and is reproduced in the Appendix [3] as follows: By order (Doc. 1611) filed August 18, 2000; the Court denied the Petitioner's motion for post-conviction relief, pursuant to 28 U.S.C. § 2255.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit decided this case on November 13, 2000, (Appendix 1) Jurisdiction to review this petition is conferred by Rule 11 of the rules of the Supreme Court of the United States filed within ninety (90) days of the date of the decision to decline to review this matter "en banc," Appendix [2].

CONSTITUTION PROVISIONS

AMENDMENT V:

No person shall be deprived of life, liberty or property without due process of law.

AMENDMENT VI:

In all criminal prosecutions, the accused shall have the assistance of Counsel for his defense.

AMENDMENT XIV:

No person shall be denied equal protection of the law.

STATEMENT OF CASE

Causey Bryant, Jr., was one of 21 defendants who was convicted by a Jury in 1989, of various violations of federal narcotic laws. A timely direct appeal was taken, and the Eleventh Circuit Court of Appeals affirmed the conviction(s) and sentencing of Mr. Bryant.

Mr. Bryant filed a pro-se motion for post-conviction relief, pursuant to a 28 U.S.C. § 2255 (Doc. 1354) on February 8, 1996, and a supplement thereto (Doc. 1364), on March 18, 1996. The government's response to Mr. Bryant's motion (Doc. 1383) was filed on May 20, 1996, and a supplement and correction to its response (Doc. 1387) was filed on June 13, 1996.

On June 26, 1996, a mere 13 days after the government had filed its response, the district court denied Mr. Bryant's §

2255 petition. A timely notice of appeal was filed, however, due to a delay in the payment of the $105 dollar filing fee, the appeal was first dismissed because of want of prosecution; then later reinstated.

On November 12, 1997, the Eleventh Circuit of Appeals issued its briefing scheduled in the instant appeal. Thereafter, Mr. Bryant filed an "Extraordinary Motion to stay the appeal and for order or remand" to re-amend his § 2255 with the "Newly Discovered Evidence". In Mr. Bryant's seeking to stay and order for remand, Mr. Bryant submitted (as attached thereto) certain F.O.I.A. materials that he had received subsequent to the filing and ultimate decision of his § 2255 by the district court.

Mr. Bryant alleged that the F.O.I.A. materials revealed that his trial counsel, a former AUSA, had been less than candid about his role in the investigation of Mr. Bryant when Counsel had served as a AUSA in the investigation of Mr. Bryant, and served as an AUSA in the office which had prosecuted Mr. Bryant.

Mr. Bryant filed the "Extraordinary motion" on the record so that the "Extraordinary motion" could not be time barred from the courts. Mr. Bryant sought to have the Court to stay the instant appeal, and remand it back to the district court to allow Mr. Bryant to amend his original § 2255 petition. The "Newly Discovered Evidence" to support Mr. Bryant's argument that a serious "Conflict of interest' existed with his attorney, which both the government and his attorney had concealed from him and the court. Mr. Bryant verily believes led to his unknowingly, unintelligently, and involuntarily

"waiver' to effective assistance of counsel, which the court had required Mr. Bryant to sign.

The Eleventh Circuit Court of Appeals denied Mr. Bryant's "Extraordinary Motion" for stay and remand, and ordered that Mr. Bryant file his initial brief within 21 days.

On December 3, 1998, the United States Court of Appeals for the Eleventh Circuit affirmed Mr. Bryant's § 2255 petition. On March 2, 1999, Mr. Bryant filed a second motion for post-conviction relief pursant to 28 U.S.C. § 2255 (Doc. 1581) and accompanying memorandum of law (Doc. 1582). The judgment of the Eleventh Circuit Court of Appeals affirming the Court's denial of Mr. Bryant's first § 2255 motion. The United States District Court states:

> "That the defendant has failed to comply with this requirement, and the Court will thus dismiss his motion without prejudice to his right to seek permission to file a successive § 2255 Motion from the Eleventh Circuit Court of Appeals."

On April 18, 2000, pursuant to 28 U.S.C. § 105 and 106 of the anti-terrorism and effective death penalty act of 1996, Causey Bryant, Jr., filed an application seeking an order authorizing the district court to consider a second or successive motion to vacate, set aside, or correct his federal sentence. As to Mr. Bryant's claim that his counsel had a 'conflict of interest', Mr. Bryant has made a prima facie showing that his claim satisfies the statutory criteria. Thus, his application for leave to file a second or successive motion in order to raise this claim is hereby granted.

Mr. Bryant's motion for post-conviction relief pursuant to 28 U.S.C. § 2255 (Doc. 1595), filed May 1, 2000 and memorandum of law in support of (Doc. 1596). The Eleventh Circuit Court of Appeals entered an order on April 18, 2000, which certified the single ground raised in his successive § 2255 motion. Newly Discovered Evidence of trial Counsel's alleged 'Conflict of Interest'. The government's response (Doc. 1605) in opposition to Mr. Bryant's motion was filed June 26, 2000. Mr. Bryant filed a reply (Doc. 1606) to the government's response on July 13, 2000. On August 18, 2000, some 35 days later, the United States District Court denied Mr. Bryant's § 2255 motion (Doc. 1595) and directed the Clerk to terminate the criminal motion and close the civil case.

Mr. Bryant's Petition For Writ of Certioriari now follows the Newly Discovered Evidence, and Extraordinary Motion.

REASONS WHY THIS PETITION SHOULD BE GRANTED

This petition should be granted for three reasons: First, the trial court erred in allowing an Ex-Assistant United States Attorney to represent Mr. Bryant at trial, in which Counsel for the petitioner was in charge with the investigation that led to Mr. Bryant's indictment, arrest and conviction. Second, denying Mr. Bryant a due process right to appeal the Discovered Evidence and Extraordinary Motion is in violation of Mr. Bryant's equal protection rights under the law pursuant to the Fifth, Sixth and Fourteenth Amendments. Third, the answer to the narrow constitutional question presented, whether Mr. Bryant sentence was permissible as a result in a Federal statute where the quantity or type of criteria are, and whether the indictment contains the elements of the offense intended to be charged.

1. **Whether the Newly Discovered Evidence shows that Counsel had substantially participated in the investigation that led to the petitioner's indictment, arrest, and ultimate conviction in violation of Petitioner's due process right to a fair trial.**

Attached hereto are various documents offered in support of this instance brief. These documents are marked "Attachment(s) [01-04], and "special F.O.I.A. Exhibits [1-14]. The transcript of the January 6, 1989 hearing on the 'Conflict of "Interest' issue is provided in its entirety and is marked "Attachment" No. 3].

On May 8, 1997, Mr. Bryant received certain F.O.I.A. materials from the F.B.I., which Mr. Bryant had requested dating as far back as January 19, 1992. [See Attachment No. 1, the U.S. Department of Justice (DOJ) acknowledgement of the F.O.I.A. request dated May 8, 1997 response to the F.O.I.A. request of January 19, 1992, 320 pages disclosed and thereto attached/submitted to Mr. Bryant. The factual predicate for the claim could only have been discovered through the exercise of due diligence.

The Newly Discovered Evidence would almost certainly compel a different result in the event that Mr. Bryant would have had an effective counsel in a new trial. Mr. Bryant did not know about the newly discovered evidence in time for trial and there was no showing that Mr. Bryant's failure to produce the evidence was due to neglect. See United States v. Walsus, 616 F. 2d 283 (1980).

The trial record indicates that Mr. Bryant was represented at trial by retained counsel, Mr. Alan Ceballos, Esquire, prior to entering private practice. Mr. Ceballos had served as an assistant U.S. Attorney for the middle district of Florida. Jacksonville, for over five (5) years. Notable, Mr. Bryant was indicted and convicted in the very same district, division, and by the very same office of the U.S. Attorney that Mr. Ceballos had served in as AUSA.

Mr. Ceballos advised Mr. Bryant that he had formerly worked for the federal government. In fact, Mr. Ceballos alerted the lower court to a possible 'Conflict of Interest' issue due to his prior position as AUSA following a written waiver concerning a [Right to 'Effective Assistance of Counsel'] was

prepared by AUSA Ronald T. Henry (prosecutor) and submitted to Mr. Ceballos (counsel) for Mr. Bryant for his signature. [See Attachment No. 4]. Hereto as is evidenced from the Waiver, and from testimony by both the prosecuting AUSA Ronald T. Henry, and Counsel for Mr. Bryant (Mr. Ceballos), as well as Mr. Bryant was led to believe that there existed a possibility that Mr. Ceballos advised agents in the investigation..., that Mr. Bryant "May have been or may have become a target. More significant was the government's representation to the magistrate court Judge Howard T. Snyder that:

> "I'm prepared to recommend to the Court that the United States' attorney's position is that Mr. Ceballos did not have substantial input into any investigation....' [AUSA Ronald T. Henry].

Although Counsel Ceballos testified that he had, "been advised by Mr. Henry (AUSA) that the matter in this case, the actual official matter of Mr. Bryant's case was opened in September (1988), and that he left the office (U.S. Attorney) office before those dates". [See transcript, pg. 10 LL 17-22, attachment No. 03]. Mr. Bryant has evidence herewith submits same, which shows beyond any and all doubt, that Mr. Ceballos was still active in the United States attorney office in October/November of 1988.

The due process clause of the fourteenth amendment is violated when any principal involved in the proceedings makes false statements or willfully misleads the court and Mr. Bryant in the case at hand. Mr. Ceballos told the court that he had a small role in the investigation in which Mr. Bryant was indicted

for. This statement was no less than testimony; in fact, it was false testimony, both attorneys knew that Mr. Ceballos lied to the court and his client, and neither one tried to correct this falsehood.

Again, the question is, did Mr. Ceballos mislead his client? The answer is yes. At no time should anyone be making false statements in court, and no attorney should like to his client for any reason. This issue of who can lie and cannot was addressed by the U.S. Supreme Court in Henry Nupe v. Illinois, 360 U.S. 264, 3 L. Ed. 127. The opinion of the Court was delivered by Chief Justice Warren, who said:

> "A lie is a lie, no matter what its subject, and if it is in any way relevant to the case the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth."

It is my view that my then Counsel Mr. Ceballos had the same duty. But, due to his unprofessional conduct and greed, Mr. Ceballos decided to lie to client, along with the U.S. Attorney Mr. Henry, in doing so played both sides of the Court, by violating 18 U.S.C. § 371, which brings us back to the waiver.

Just so I am clear here, I did not waive away all my rights. I signed a waiver that stated Mr. Ceballos only gave advice. I did not waive on anything other than that, and as you very well know, a waiver is nothing less than a contract, and is subject to all the rules, and procedures that govern contract law, and that waiver signed by Mr. Bryant only covered advice. So

as far a the law is concerned, Mr. Bryant only agreed to waive if Mr. Ceballos only gave advice, and therefore Mr. Ceballos himself has already violated the waiver, long before I signed it. Again, all one need to do is read the waiver, to see just what Mr. Bryant waived. Mr. Bryant did not waive anything other than advice. Please review contract law as to my waiver.

The false statements by both counsels, Mr. Ceballos and the U.S. attorney, Mr. Henry, 'Robbed' me of all the facts, therefore, the waiver is void. Mr. Ceballos and Mr. Henry were looking to get around 18 U.S.C. § 207 and at the same time, entered into a conspiracy to defraud the United States government in violation of 18 U.S.C. § 371. Contrary to Mr. Ceballos representation to the magistrate court, which was hearing the 'conflict of interest' issue:

> "The actual official matter of Mr. Bryant's case...was not opened in September (1988), rather, was opened/began in the Spring of 1987 thru 1988, at that time Mr. Ceballos was the AUSA charged with, and personally responsible for directing the investigation of Mr. Bryant," and
>
> Mr. Ceballos did not leave office of the U.S. Attorney before the substantive acts in the case occurred, and his eventual departure from the office of the U.S. Attorney did not occur "in the last part of June as Mr. Ceballos represented to the Court, but some months of more thereafter."

Mr. Bryant asserts that the hereto attached F.O.I.A. materials [Marked] special F.O.I.A. Exhibits, clearly reveals:

1) The state of Florida/JSO began its investigation of Mr. Bryant on 1-6-1988 and the FBI/Government entered the investigation on 2-29-1988. [See: F.O.I.A., Exhibits No. 4, pg. 2]

2) AUSA Mr. Ceballos was cross-designated as an Assistant State Attorney, and as early as March 1988, 'had begun preparing an affidavit for approval for a state authorized wiretap.' [See: F.O.I.A., Exhibits No. 4, pg. 1 thru 6].

3) FBI Headquarters granted authority for the Jacksonville, FL division to participate in a joint investigation with the Jacksonville sheriff's office (JSO), including state authorized electronic surveillance of Mr. Bryant, noting that 'the Jacksonville Division (FBI) and the U.S. Attorney Northern District of Florida, have concurred in this (joint) investigation' of Mr. Bryant. [See: F.O.I.A. Exhibit No. 2].

4) F.O.I.A. Exhibit No. 1, clearly indicates that the FBI changed the character of their investigation of Mr. Bryant to add "OCDETF" (Organized Crime Drug Enforcement Task Force). This teletype is date May 1988.

5) F.O.I.A. Exhbit No. 5, unmistaken evidences of Counsel Ceballos' personal and substantial knowledge and participation in the government's initial investigation of Mr. Bryant wherein is stated that:

6) "On 4-1-1988 AUSA M. Alan Ceballos and Detective (redacted) but is Detective Robert A. Walsh, Jacksonville Sheriff's Office (JSO) presented an affidavit to Circuit Judge A.C. Soud seeking authorization for a state write tape..." (Pg. 1).

"Monitoring in this matter will begin at 3:00 p.m., 4-1-1988 and all subjects identified will be prosecuted by pre-agreement in Federal Court by AUSA Ceballos." [Pg. 2].

7) F.O.I.A. Exhbit No. 6, dated September 1988, confirmed that '15 individuals have been indicted in this matter' [Flowing from the 4-1-1988 wire tap referred to in the F.O.I.A. Exhibit No. 5, Supra].

More significantly, F.O.I.A. Exhibit No. 6 specifically states that a September (1988) Federal Grand Jury was being convened concerning "other subjects" of this investigation and that the U.S. Attorney's office, in conjunction with JSO and DEA "continues to investigate Causey Bryant, Jr., who was a previous subject of this matter (joint state/federal investigation)"

Most damning of all, F.O.I.A. Exhibit 6 clearly, unmistakenly squarely refutes both counsels Ceballos and AUSA Henry's representation to the magistrate Judge hearing the 'conflict of interest' issues where they proclaim that:

> "Mr. Ceballos did not have substantial input into any investigation"concerning Mr. Bryant. [See: Transcript, Attachment No. 03, pg. 4].

Exhibit No. 6 states emphatically:

> 1. "Causey Bryant, Jr., was one of the original subjects noted in this investigation. Three separate state authorized wire taps were utilized, which were manned by JSO, DEA and FBI. The case was then prosecuted in federal court by AUSA M. Alan Ceballos, who had been cross designated as a special assistant state attorney." [Pg. 2, Exhibit No. 6].

Mr. Bryant contends and strongly urges this honorable court to recognize that the evidence, as gleaned from the F.O.I.A. materials Mr. Bryant has obtained, some ten (10) years after his conviction, clearly demonstrates the following:

1) Counsel Ceballos failed to fully disclose both to the court and to Mr. Bryant the extent of his knowledge and personal participation of/in the government's investigation of Mr. Bryant when Mr. Ceballos was serving as AUSA, violating 18 U.S.C. § 371.

2) Counsel Ceballos, intentionally deceived both the court and Mr. Bryant by alluding to a

possible involvement in the investigation of Mr. Bryant. [See: Language of Waiver (i.e., "May have represented the United States or advised agents in investigation,") of which Mr. Bryant may have become a target."]

3) AUSA Henry, whom prosecuted Mr. Bryant, falsely represented to the Magistrate Court [hearing the 'Conflict of Interest' issue] that:

> "Mr. Ceballos did not have substantial input into any investigation..." of Mr. Bryant. [See: Transcript, Attachment No. O3, Pg. 4].

Had the government and counsel been truthful and forthcoming with regards to Mr. Ceballos' personal participation in the joint investigation by state-federal officials of him, that he would never have signed the waiver (to effective assistance of counsel)and would have never proceeded forward into trial with Mr. Ceballos as Counsel. Further, Mr. Bryant suggests that had the government and Mr. Ceballos been truthful and honest with the Court, the Court itself would not have allowed the prosecution to violate both 18 U.S.C. § 207 and 18 U.S.C. § 371 as a matter of law, within former section [284] of this title [now this section] which provided that whoever, having been employed in any agency of the United States, within two years after when such employment ceased, prosecutes or acts as counsel, attorney, or agent for prosecution, any claims against the United States involving subject matter directly connected with which such person was so employed

shall be fined or imprisoned or both. Shaw v. U.S., 1957, 244 F. 2d 930, 17 Alaska.

II. Whether the Petitioner was denied ineffective assistance of Counsel where the Government lead prosecutor/investigator was petitioner's trial counsel and AUSA out of the Jacksonville office whom was cross-designated as a Special Assistant State Attorney in that capacity were able to appear before state authorities for wire tap orders against petitioner.

Mr. Bryant argues that his counsel ineffective assistance in based primarily on the counsels' failure to act in a professional and reasonable manner. In plain fact, Counsel out and out lied to this client, at one or more of the critical states of Mr. Bryant's criminal proceedings. The Arraignment, Detention Hearing, Discovery Disclosure of Brady, Jencks - Act Material 18 U.S.C. § 3500, Pretrial Disclosure, Pretrial Hearing, Disclosure of Electronic Surveillance, Trial and Sentencing.

Mr. Bryant was denied his constitutional guaranteed right to the effective assistance of Counsel, as defined in Strickland v. Washington, 466 U.S. 688, 695, 104 S. Ct. 2052, 2068, L. Ed 2d 674. It appears to be much the same, when Mr. Bryant trial lawyer failed to present substantial mitigating evidence to his client and the court about his role in the investigation that Counsel spearheaded while in office as the AUSA in charge of the investigation of Mr. Bryant.

The merits of Mr. Bryants' claim are squarely governed by Strickland. To establish ineffective assistance of counsel, Mr. Bryant must prove:

1) That counsel's performance fell below and objective standard of reasonableness 466 U.S., at 688; and

2) That the deficient performance prejudiced the defense, which requires a showing that there is a reasonable probability that, but for Counsel's unprofessional errors, the result of the proceeding would have been different, id., at 694.

Because the Strickland test qualifies a clearly established federal law, as determined by the Supreme Court, although there are few situations in which the overriding focus on fundamental fairness may affect the analysis, see Strickland, 466 U.S., at 692 cases such as Lockard and Nix v. Whiteside, 475 U.S. 157, do not justify a department from a straightforward application of Strickland when Counsel's ineffectiveness deprives the defendant of a substantive or procedural right to which the law entitles him.

Here, Mr. Bryant had a constitutionally protected right to be provided with the evidence that his trial counsel either failed to discover or failed to offer, moreover counsel's unprofessional service prejudice Mr. Bryant within the Strickland's meaning.

Mr. Ceballos and Detective Walsh went before the undersigned judges of the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida, and personally appeared was M. Alan Ceballos and detective Robert A. Walsh presented this application for extension of order authorizing

interception of wire communications pursuant to Chapter 934 Florida Statutes.

The Circuit Court of the Fourth Judicial Circuit of Florida in and/or Duval County, by Ed Austin, as State Attorney and before the honorable A.C. Soud, Jr., Judge of the Circuit Court authorized and approved for the purpose of a Joint State-Federal task force to fully investigate Causey Bryant, Jr., at all levels of their investigation. The purpose for the investigation by Mr. Ceballos and Detective Walsh was to know all of the facts, circumstances, and summary of Mr. Bryant criminal activity as alleged in this application for order authorizing the interception of wire communications, and to identify the financial assets as well as the manner and means by which the organization imports, prepares, stores and distributes cocaine. [See: Exhibit #5 showing Mr. Ceballos and Detective Walsh presenting an affidavit to Circuit Court Judge A.C. Soud, Jr., Exhibit A is the actual application for order authorizing interception of wire communications pursuant to Chapter 934.07 Florida Statutes, that Mr. Ceballos and Detective Walsh prepared and Exhibit #14 shows on 6-16-1988 and 6-22-1988 an indictment was issued on 6-24-1988, an arrest warrant was issued after a federal grand jury indictment concerning Causey Bryant, Jr., and others, Mr. Bryant was not arrested at that time, and the investigation is continued against Mr. Bryant.

The second indictment of the 67c investigation is the end of Mr. Bryant's investigation by Mr. Ceballos and Detective Walsh. At that roundup, 22 defendants were involved as noted above. The takeover of that investigation of Mr. Bryant in November 1988, herein and hereafter was conducted

by AUSA Ronald T. Henry. Mr. Ceballos, Mr. Henry, and Detective Walsh, worked in conjunction until Mr. Ceballos fully informed Mr. Henry in the takeover of the investigation. Mr. Ceballos took Mr. Henry through all of the necessary procedures like the application for order authorizing interception of wire communication, facts, circumstances, summaries of police technology, management, and to identify, the financial assets as well as the manner and means by which the organization imports, prepares, stores, and distributes cocaine, and to also confiscate any and all assets owned by Mr. Bryant through the interception of wire communication.

Mr. Henry was cross-designated as an Assistant State Attorney and was working in conjunction with the State Attorney's office in the obtaining of the State authorized wire tap. These procedures have been discussed with the AUSA Mr. Henry. Communications that Mr. Henry used to investigate Mr. Bryant, in conjunction with the previous applications that Mr. Ceballos and Detective Walsh used in their application in Exhibit [A]. Exhibit [B] is the same application, and demeaner that Mr. Henry and Detective Walsh used in their investigation against Mr. Bryant. After all of the state investigation was over, the Honorable Judge A.C. Soud, Jr., issued an arrest warrant on 11-30-1988.

III. Whether petitioner due process rights was violated when counsel for the Petitioner was cross-designated as a Special Assistant State Attorney in the investigation of the Petitioner.

Due process requires that when the sentencing Court relies on information of contested accuracy, defendant must have some meaningful opportunity to rebut the information. See U.S.C.A. Amendment 5 thru 14. When Mr. Bryant was lied to by his attorney and the U.S. Attorney supported that lie, at that point Mr. Bryant's due process rights were, in fact, violated.

The Supreme Court has held that convicted defendants have a due process right to be sentenced on basis of accurate information. U.S. v. Tucker, 404 U.S. 443, 447, 92 S. Ct. 589, 591, 30 L. Ed. 2d 592 (1972); Townsend v. Burke, 334, U.S. 736, 741, 68 S. Ct. 1252, 1255, 92 L. Ed. 2d 1690 (1980). Mr. Bryants' due process right were violated when his ineffective attorney investigated. Mr. Bryant for the purpose of prosecution in federal court, and then represented Mr. Bryant at trial on the same investigation that he spearheaded in Mr. Bryant's criminal defense in federal court, and the U.S. attorney co-signed Mr. Ceballos' activity. See Napue v. Illinois, 360 U.S. 264, 3 L. Ed. 2d 1217, 79 S. Ct. 1173. The Supreme Court stated that:

> "First, it is established that a conviction obtained through use of false evidence known to be such by representative of the State, must fall under the Fourteenth Amendment."

In the case before the court the U.S. Attorney knew that the defense counsel was lying to the court and his client at the 'Conflict of Interest' hearing. In Napue, the Court stated that:

> "It is No consequence that the falsehood bore upon the witness's credibility rather than directly upon defendant's guilt."

In the case at hand, Mr. Ceballos lied to the Court and his client about his involvement with Mr. Bryant's investigation. Mr. Ceballos lied as to his credibility to defend this client, when both counsel's knew that Mr. Ceballos was in conflict with his past job. When Mr. Ceballos told his client and the Court that he had little input and that, what input he did have, was limited to advice, when, in fact, Mr. Ceballos was sworn in as a Special Assistant State Attorney, so that his power to investigate Mr. Bryant could use state resources as well.

As part of his duties as a Special Assistant State Attorney, Mr. Ceballos obtained wire taps, warrants, called for meetings between State and Federal agenices, and as the U.S. Attorney made plea agreements, and deals. See Exhibit #8 the Plea Agreement that Mr. Ceballos filed in open Court on August 26, 1988. This is much more than advice, and the U.S. Attorney knew of this and supported the ineffective defense attorney in the lie. This is the same in Napue, when the Court when on to say:

> "A lie is a lie, no matter what its subject, and if it is in any way relevant to the case the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth."

The right to due process cannot be side-stepped by lies or violations of law. If the U.S. Attorney was doing his duty,

instead of violating 18 U.S.C.§ 371, he would have told the court the whole truth about Mr. Ceballos' involvement in the investigation of Mr. Bryant. Mr. Henry would have given to Mr. Bryant and the court, all records showing just what Mr. Ceballos involvement was, but in this case the U.S. Attorney decided to lie as well. A question that, must be asked here, is whether or not it is proper for a Ex-AUSA, and a formal AUSA to violate the laws of this country in order to win? Or do our justice system work on a 'win at all cost' basis? If that is the case, then how can any court be deemed fair?

When the constitution was written, it was formulated to protect all against unfair acts by those in power. In the case at bar, the man in power was the U.S. Attorney, Mr. Henry. This officer of the Court took an oath in which he solemnly swore to uphold the constitution.

Due process allows all of us to have a fair day in court, not one based on lies. There is no way now to know just how many lies were told by this AUSA at trial . The only fair and constitutional thing to do now is set aside the conviction and order a new trial with officers of the Court who do not violate the laws and the constitution of the United States in order to win at all cost, and allow Mr. Bryant to have an attorney who will not conspire with the government attorney to violate Mr. Bryant's right to effective assistance of counsel, in violation of 18 U.S. C.§ 371, and to get around 18 U.S.C. § 207.

Mr. Bryant asks that this honorable court remember that, a 'lie is a lie,' and once a person lies, everything he says after or before that must now be viewed as a lie. It is too bad that two (2) officers of the court decided to take justice into their own

hands. One did it for the money. Mr. Ceballos, and the other to win the case, not for Justice, but for his career, Mr. Henry. Both violated the law, both should be held accountable for their illegal actions not the victim of those illegal acts. Mr. Bryant's constitutional and civil rights of § 1983 has been violated. Mr. Bryant now request that his conviction be set aside, and a new trial be ordered.

IV. Whether the new prevailing case law handed down from the Supreme Court in Apprendi has now established as a constitutional rule that in which the Court in Jones suggested by way of footnote. As a result in a Federal Statute where the quantity or type of drug constitutes a factor which might increase the maximum statutory penalty for an offense then the quantity or type of drug constitutes an element of such a offense.

The answer to the narrow constitutional question presented, whether Mr. Bryant sentence was permissible, given that it exceeds the 10 year maximum for the offense charged was foreshadowed by the holding in Jones v. United States, 526 U.S. 227. That, with regards to federal law, the Fifth Amendments due process clause and the sixth amendments notice and jury trial guarantees require that any fact other than prior conviction that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt.

Mr. Bryant cites have held that such a circumstance might arise if, after Mr. Bryant has been convicted and has exhausted his opportunities to obtain a reliable judicial

determination of the fundamental legality of his conviction or sentence, because his claim is based on a court decision which was issued after Mr. Bryant had been convicted and had exhausted his opportunities for post-conviction relief. Mr. Bryant was not afforded a reasonable opportunity to obtain a reliable judicial determination of the fundamental legality of his conviction on the issue that Mr. Bryant now raises, either when he was convicted, on appeal, or later when Mr. Bryant filed his § 2255 motions since the Apprendi decision had not been issued.

Petitioner, Causey Bryant, Jr., was convicted by a jury on May 15, 1989 of conspiracy to distribute and possess with intent to distribute cocaine base in the amount being 50 grams or more, in violation 21 U.S.C. § 841 (a)(1) and 21 U.S.C. § 846 [Count 1].

Petitioner knowingly, willfully and intentionally distribute and cause to be distributed cocaine base in the amount of said substance being 5 grams or more, in violation of title 21 U.S.C. § Section 841 (a)(1) and title 18 U.S.C. § Section 2 [Count 2].

Petitioner knowingly, willfully and intentionally distribute and cause to be distributed cocaine base in the amount of said substance being 50 grams or more, in violation of title 21 U.S.C. § Section 841(a)(1) and title 18 U.S.C. § Section 2 [Count 3].

Petitioner knowingly, willfully and intentionally possess and cause to be possessed cocaine with the intent to manufacture cocaine base, in violation of title 21 U.S.C. § 841 (a)(1) and title 18 U.S.C. § Section 2 [Count 8].

Petitioner knowingly, willfully and intentionally manufacture and cause to be manufactured 50 grams or more of cocaine base, in violation of title 21 U.S.C. § Section 841(a)(1) and title 18 U.S.C. § Section 2 [Count 9].

Petitioner knowingly, willfully and intentionally possess with the intent to distribute cocaine base, in the amount of said substance being 50 grams or more, in violation of title 21 U.S.C. § Section 841(a)(1) and title 18 U.S.C. § Section 2 [Count 10.]; and Causey Bryant, Jr., shall forfeit to the United States all interest in the following real and personal property and structures and things affixed thereto.

Mr. Bryant was sentenced on July 18, 1989, to a term of life imprisonment on Counts, 1, 3, 9 and 10, and for a term of twenty (20) years on Count 2; and a for a term of twenty (20) years on Count 8. Sentences on all counts shall run concurrently with one another, and five (5) years of term of supervised release.

The issue in this case is whether the failure of an indictment to include an essential element of the offense charge in each count invalidates each count within the indictment and requires it's dismissal on such element of omission was the failure to charge that Mr. Bryant effect on interstate commerce. There is no dispute that, this requirement of "an effect on interstate established in drug statutes."

In Russell v. United States, 369 U.S. 749, 763-68, 82 S. Ct. 1038, 1046, 8 L. Ed. 2d 240, the Court stated two of the criteria by which the sufficiency of an indictment under the Fifth and Sixth Amendments may be measured:

> "These criteria are first, whether the indictment contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and secondly, in the case any other proceedings are taken against him for a similar offense, whether the records shows with accuracy to what extent he may plead a former acquittal or conviction.

This same case declares that, a bill of particulars can not save invalid indictment, Russell, 369, U.S. at 770, 82 S. Ct. Moreover, a motion that, an indictment fails to charge an offense may be at anytime, Fed. R. Crim. 12(b).

The government may take the position that, the indictment was cured by the fact that, each count cited the statute that, Mr. Bryant is alleged to have violated. Although the statute in question explicitly requires knowledge of the falsity, if this were enough to cure a deficient statement, then almost no indictments to cite the statute that is alleged to have been violated. Accordingly, this court should apply the rule in this case and find that, this indictment is in fact defective for failure to allege an essential ingredient of the offense charged.

In Mr. Bryant's case, his conviction requires reversal and the indictment dismissed, because his indictment failed to ensure that, he was prosecuted only on the basis of facts presented to the Grand Jury. U.S. v. Rosi, 27, F. 3rd 409, 414. (9th Cir., 1994). At common law, the most valuable function of the Grand Jury was to stand between the prosecutor and the accused, and to determine whether the charges was founded upon credible testimony. Hale v. Henkel, 201, U.S. 43, 59, 26

S. Ct. 370, 50 L. Ed. 652. Incorporated into the Fifth Amendment by the founders. There is every reason to believe that, our constitutional grand jury was intended to operate substantially like it's 'English progenitor.' Costello v. U.S., 350, U.S. 359, 362, 76 S. Ct. 406, 100 L. Ed. 397. The Fifth Amendment thus requires that, a defendant be convicted only on charges considered by the Grand Jury. A failure to follow or enforce this requirement would allow a Court to guess as to what was in the minds of the Grand Jury at the time they returned the indictment.

The question now is, did Mr. Bryant face charges for which he was indicted for or was the courts guessing with so much missing from the indictment, it is hard to know what was the offense Mr. Bryant was to have violated. There's also No way of knowing if this violation comes under the Jurisdiction of this Court, due to the indictment failure to list the element of effect to interstate commerce. If this was the only elements missing from the indictment, one might try to overlook the failure. But, Jurisdiction is a must in order for a federal prosecution to take place.

As the Eleventh Circuit recently stated, citing Jones v. United States, 526 U.S. 227, 119 S. Ct. 1215 (1999), in order to obtain a conviction, the government must charge all the elements of an offense, submit all the elements to a jury, and prove all of them beyond a reasonable doubt, United States v. Hester, 1999 F. 3rd 1287, 1290 (11th Cir. 2000).

Relying upon its decision in Jones, the United States Supreme Court on June 26, 2000, in Apprendi v. New Jersey,

U.S. 120 S. Ct. 2348, 2362-63 (2000), held in clear and unequivocal language as follows:

> other than the fact of a prior conviction, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a Jury, and proven beyond a reasonable doubt.

The Court in Apprendi, 120 S. Ct. at 2355, stated that its decision was "foreshadowed" by the following language in footnote in Jones which had construed a federal statute:

> under the due process clause of the Fifth Amendment and notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increase the maximum penalty for a crime must be charged in an indictment, submitted to a Jury, and proven beyond a reasonable doubt.

Jones v. United States, 526, U.S. at 243, N.6 (Emphasis added).

It is true that the jury was also given an instruction regarding the elements of the conspiracy which contained the indictments general quantity, "in excess of 50 grams or more of cocaine base." It was told that, it must find all elements of the conspiracy beyond a reasonable doubt. However, in the latter part of that instruction, where the court set forth the elements of the distribution and possession charges underlying the conspiracy, there was no mention whatsoever of quantity.

Mr. Bryant asserts four claims of a constitutional violations.

First, Mr. Bryant alleges the government did not treat the drug type or quantity as elements of the conspiracy, in violation of his fifth amendment right to due process and sixth amendment right to jury trial.

Second, Mr. Bryant contends that his counsel was ineffective in failing to inform his client that he was the AUSA charged with and personally responsible for directing the investigation of Mr. Bryant. Leaving that very same office of the AUSA, than becoming a criminal defense attorney making Mr. Bryant his very first client in private practice of the investigation that he headed, also counsel failed to object to a sentencing enhancement for 'crack cocaine' where they type of cocaine was not proven beyond a reasonable doubt based upon the evidence in violation of Mr. Bryant Sixth Amendment right to a fair trial.

Third, Mr. Bryant asserts that the court incorrectly calculated the quantity of drugs attributable to Mr. Bryant, in violation of his Fifth Amendment right to due process.

Fourth, Mr. Bryant contends that the Court improperly applied a leadership role enhancement under U.S.S.G. § 3b1.1(a) and a firearm enhancement under 2d1.1(b)(1) which was not charged in the indictment, in violation of Mr. Bryant Fifth Amendment right to due process.

CONCLUSION

For these reasons, Petitioner's request that this court grant this petition for writ of Certiorari to the Eleventh Circuit Court of Appeals

Respectfully Submitted, this 12th day of July 2001.

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In the United States Court of Appeals
For the Eleventh Circuit

No. 00-14606-H

Causey Bryant, Jr.
Petitioner-Appellant,

vs.

(Filed Nov. 13, 2000)
Thomas K. Kahn, Clerk

United States of America,
Respondent-Appellee.

Appeal from the United States District Court for the
Middle District of Florida

ORDER:

Appellant's motion for a Certificate of Appealability is DENIED for failure to make a substantial showing of the denial of a constitution right. 28 U.S.C. § 2253(c)(2).

/s/ R. Lanier Anderson, III
Chief Judge

In The United States Court of Appeals
For the Eleventh Circuit Court

No. 00-14606-H

Causey Bryant, Jr.,
Petitioner-Appellant.

vs.

(Filed Jan. 17, 2001)
Thomas K. Kahn (Clerk)

United States of America,
Respondent-Appellee.

Appeal from the United States District Court for the
Middle District of Florida

Before Carnes and Marcus, Circuit Judges.

By The Court:

Appellant's "petition for rehearing en banc" is construed as a motion for reconstruction of this Court's order dated November 13, 2000. Upon reconsideration, Appellant's motion for a certificate of appealability is denied because appellant has not made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

App. 3

United States District Court
Middle District of Florida
Jacksonville Division

United States of America

vs. Case No. 3:88-CR-215-J-12
3:00-CV-455-J-12A

Causey Bryant, Jr.

ORDER

By order (Doc. 1611) filed August 18, 2000, the Court denied the defendant's motion for post-conviction relief, pursuant to 28 U.S.C. § 2255. On September 1, 2000, the defendant filed a notice of appeal (Doc 1612) which the Court construes as a request for a Certificate of Appealability. The Court must now determine whether the defendant should be granted a Certificate of Appealability and if so, which issues should be certified for appeal. See 28 U.S.C. § 2253(c)(1)(3); Edwards v. United States, 114 F. 3d 1083 (11th Cir. 1997).

The Court finds that the defendant has not made a substantial showing of the denial of a constitutional right for the reasons set forth in the Court's previous order (Doc. 1611). The defendant's request for a Certificate of Appealability must be denied, accordingly it is

ORDERED AND ADJUDGED:

That the defendant's request for a Certificate of Appealability is denied.

Done and ordered at Jacksonville, Florida, this 7th day of September 2000.

Howell W. Melton
Senior United States District Judge